IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 568

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Appellant,*

vs.

ALABAMA PUBLIC SERVICE COMMISSION, HUGH WHITE, H. F. LEE, ET ALS, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OF APPELLANT DISCLOSING BASIS OF JURISDICTION

This is an appeal from a decree denying an application before three Federal judges for an interlocutory injunction made in a suit in equity brought by appellant under Section 266 of the Federal Judicial Code, in the District Court of the United States for the Middle District of Alabama, seeking to enjoin the Alabama Public Service Commission consisting

of the defendants (appellees) Hugh White, H. F. Lee, and Frank P. Morgan, and of the defendants (appellees) Charlie C. McCall, Attorney General of Alabama, and J. Q. Smith, Assistant Attorney General of Alabama, from attempting to enforce against appellant penalties under the statutes of Alabama claimed to have been incurred by appellant by reason of its discontinuance without the consent of the Alabama Public Service Commission, of two interstate passenger trains numbered 925 and 926, one eastbound and one westbound, that previously ran between Birmingham, Alabama and Amory, Mississippi and stopped at the intermediate stations in Alabama, of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark and Carbon Hill.

(a) The bill praying for the interlocutory injunction alleged,

(1) That the trains having been operated in interstate commerce, were not subject to the jurisdiction of the Alabama Commission, and that the Alabama statutes cited hereafter construed by the Commission as requiring appellant to obtain the Commission's consent to the discontinuance of the trains and of the local service afforded thereby, and penalizing a failure to obtain such consent, operated as an unlawful burden upon, regulation of, and interference with interstate commerce, in violation of paragraph 3 of Section 8, of Article I of the Constitution of the United States.

(2) That the attempt of the state officers to enforce the penalties against appellant under the pro-

visions of the Code of Alabama would be violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The statutory provision believed to sustain the jurisdiction is Section 266 of the Federal Judicial Code, (June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

(b) The date of the decree denying the interlocutory injunction was August 17, 1928. (Record, p. 31). The application for appeal was presented and allowed on October 6, 1928. (Record, p. 43, 44).

(c) The bill of complaint filed by appellant (Record, p. 1 to 16) alleged that prior to June 18, 1928, appellant had operated two passenger trains, one eastbound and one westbound, numbered 925 and 926, between Birmingham, in the State of Alabama, and Amory, in the State of Mississippi; that these interstate trains had afforded local service to the Alabama stations of Sulligent, Crews, Beaverton, Guin, Winfield, Glen Allen, Bazemore, Eldridge, Clark and Carbon Hill, but that on June 18, 1928, appellant, considering that because of the interstate character of the trains the Alabama Public Service Commission had no jurisdiction over them, had discontinued these trains between Carbon Hill, Alabama and Amory, Mississippi, without securing or applying for the consent of the Commission, and that as a consequence the two trains no longer afforded passenger service to the said Alabama stations.

That the Alabama Commission, asserting that the action of the appellant in discontinuing the two trains was a violation of the Alabama laws, had threatened to enforce by suits in the Alabama courts the penalties against the appellant under the following sections of the Alabama Code (1923) numbered 9713, 9730, 5350 and 5399:

> "Section 9713. Certificate of Convenience and Necessity.—No transportation company shall undertake the extension of its service or the construction of a new plant, property or facility (except ordinary extensions in the usual course of business), or shall acquire or operate any line, plant or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require, or the public interest will be best served by, such extension, construction, acquirement, operation, or acquirement and operation. No transportation company subject to this article shall abandon all or any portion of its service to the public or the operation of any of its lines, properties or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for non-payment of charges, non-uses, violation of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been obtained from the commission a permit allowing such abandonment. The commission, as it deems to the best interest of the public, may grant in part or in whole, or may refuse such application, and in the event such cer-

tificate of necessity is granted, the commission may impose such conditions as it deems expedient for the protection of the public interest. The commission must require the transportation company, when such application for a certificate of convenience is granted, to avail itself promptly of the authority or right granted, and in the event the transportation company fails to promptly avail itself of the rights granted, such certificate of convenience must be revoked. The provisions of this section shall not apply to transportation companies which are required under Title *IV* of the 'Transportation Act' of congress, approved February 28, 1920, to obtain from the interstate commerce commission a certificate of convenience and necessity."

"Section 9730.—Failure of Transportation Company to Comply with provisions of this Article; Penalty.—Any transportation company which wilfully fails to comply with any of the provisions of this article or which abandons any service without first obtaining the consent of the Commission, or wilfully fails to obey, observe or comply with any lawful order, decision, rule, regulation, direction or requirement, or any part or provision thereof, of the Commission, shall forfeit to the State of Alabama not over one thousand dollars for each offense, the amount to be fixed by the courts and to be recovered in a civil suit by the State instituted in the Circuit Court of Montgomery County, Alabama."

"Section 5350.—Violations of Statutes as to Reasonable Rates, Adequate Service, and Unjust Discriminations; Penalty.—Every officer, agent or employe of such common carrier or railroad corporation who shall violate or procure, aid or

abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

"Section 5399.—Violating Orders of Public Service Commission; Penalty for.—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case."

The bill alleged that the threatened attempt on the part of the defendants to enforce the penalties would be violative of the Federal Constitution because:

(1) The trains having been operated in interstate commerce were not within the jurisdiction of the State

Commission, but that the Commission was asserting that it had jurisdiction and had demanded that appellant reinstate said trains or subject itself to the penalties; that defendants were threatening to, and would unless enjoined, proceed against appellant in the courts of Alabama, to recover in one or more suits or actions the enormous and cumulative penalties provided by the Alabama statutes, and that so long as appellant failed to reinstate the service it would be open to separate actions to recover separate and cumulative penalties during each day that the failure might continue, and appellant's officers and agents would be subject to criminal prosecutions. That such an attempt to enforce the penalties would be an unreasonable interference with, burden upon, and regulation of interstate commerce, in violation of paragraph 3 of Section 8 of Article *I* of the Constitution of the United States.

(2) That the laws of the State of Alabama furnish no method or procedure by which appellant could in advance test the legality of the demand of defendants that it reinstate the trains; that the Commission had never issued any citation to or formal order against complainant requiring it to appear, or any order with reference to the operation of the trains, and therefore no action had been taken by the Commission that would lay any predicate or form any basis for appellate review by the Alabama courts.

That appellant was confronted with the necessity either of reinstating the trains or subjecting itself to the cumulative penalties, and that therefore the sec-

tions in question penalized the discontinuance of the service afforded by the trains, without appellant having been accorded an opportunity or method under the Alabama laws to first contest the question of the jurisdiction of the Commission or the legality of the statute in the courts as imposing a burden upon or regulation of interstate commerce, and that the consequent effect of the statutes was to require appellant to elect at its peril between recognizing the jurisdiction of the Alabama Commission in a case where it was the assertion of the appellant that no such jurisdiction existed, or accepting the alternative of being subjected to the penalties and criminal prosecutions referred to.

That, accordingly, the sections as so construed by the defendants were void as an attempt to deprive appellant of its property without due process of law, in violation of the Fouteenth Amendment to the Constitution of the United States.

The bill prayed for an interlocutory injunction restraining defendants from enforcing, or attempting to enforce, the penalties against the appellant. There was a hearing before a three judge court which, on August 17, 1928, entered a decree (Record, p. 31) denying the application for an interlocutory injunction and delivered an opinion (Record, pp. 31-40) holding that appellant should have applied to the Alabama Commission before discontinuing the trains and in effect decided that the defendants could enforce the penalties against appellant.

(d) The cases believed by appellant to sustain the jurisdiction of the lower court to grant the interlocu-

tory injunction and the jurisdiction of this court to review the decree denying the injunction are:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659;
Prendergast v. New Telephone Co., 262 U. S. 43, 67 L. Ed. 853;
Commonwealth of Mass. v. Mellon, 262 U. S. 447, 67 L. Ed. 1078;
C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979;
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014;
Prentis v. Atl. Coast Line R. Co., 211 U. S. 210, 53 L. Ed. 150.
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510.

W. R. C. Cocke,
Attorney for Appellant.

Service of a copy of the foregoing statement has been made upon Charlie C. McCall, Esq., Attorney General of Alabama, and J. Q. Smith, Esq., Assistant Attorney General of Alabama, attorneys for the appellees, prior to the filing hereof.

W. R. C. Cocke,
Attorney for Appellant.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 568.—October Term, 1928.

St. Louis-San Francisco Ry. Co., Appellant, vs. Alabama Public Service Commission, et al.	Appeal from the District Court of the United States for the Middle District of Alabama.

[May 20, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

Section 9713 of the Code of Alabama (1923) prohibits a railroad from abandoning "any portion of its service to the public . . . unless and until, there shall first have been obtained from the [Public Service] Commission a permit allowing such abandonment." Very severe penalties, including punishment of officers, agents and employees, are prescribed in case the abandonment is willful. §§ 9730, 9731, 5350, 5399. Without obtaining such permission or applying therefor, the St. Louis-San Francisco Railway discontinued two interstate trains by means of which it had long furnished intrastate service between several cities and towns in Alabama. Then it brought, in the federal court for the Middle District of that State, this suit against the Commission, the Attorney General and other officials, to enjoin the commencement of proceedings to enforce the penalties prescribed. An application for an interlocutory injunction, heard before three judges under § 266, was denied, 27 Fed. (2d) 893. A restraining order, issued upon the filing of the bill, was continued in force pending the determination of this appeal.

The bill alleges that the operation of the interstate trains by which the intrastate service had long been furnished had involved the carrier in losses; that the service still furnished by other trains is adequate to supply the reasonable needs of the communities; that, upon learning of the discontinuance of the service, the Commission demanded that it be restored, without first hearing the carrier; that if § 9713 is construed as requiring the carrier to

obtain the Commission's permission before discontinuing intrastate service rendered by means of an interstate train, or as prohibiting such discontinuance although an unreasonable burden is thereby imposed upon the carrier, the statute violates the commerce clause of the Federal Constitution; that if construed as requiring, without a prior hearing, reinstatement of the service so discontinued, it violates also the due process clause; and that the matter in controversy exceeds the jurisdictional amount. The prayers are for an injunction against enforcing any penalty for discontinuance of the service or for failure to reinstate the same; and for a declaration that the statute, if construed as stated, is void under the federal Constitution. The answer denies many of the allegations of the bill.

The Railway contends that it had no way of testing the constitutionality of the statute, otherwise than by this suit. It urges that if it had applied to the Commission for permission to discontinue the service, it would have thereby recognized its jurisdiction; and that since the Commission did not before directing reinstatement of the service issue any order to the carrier to appear, there was no action by the Commission which could form the basis for a review in courts of the State. We have no occasion to consider the issues of fact or to determine whether the Alabama statute if construed as suggested is obnoxious to the Federal Constitution. Upon facts admitted it is clear that the carrier should not have discontinued the intrastate service without first applying to the Commission for permission. No constitutional right could have been prejudiced by so doing. No emergency existed requiring immediate action. And no serious financial loss would have been incurred by the slight delay involved. *Western & Atlantic R. R.* v. *Georgia Public Service Commission*, 267 U. S. 493, 496; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 595.

The past failure of the Railway to apply for leave to discontinue the service does not, however, justify exposing it, and its officers and employes, to the severe penalties prescribed by the statute. It may be that, upon full presentation of the facts, the Commission would find that to continue the service would subject the carrier to an unreasonable burden; or the carrier may suggest some satisfactory substitute for the specific service now de-

manded of it. The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued. Compare *Ohio Oil Co.* v. *Conway*, 279 U. S. —. If after such hearing the Commission insists that the service objected to be restored, further proceedings appropriate to the situation may be had in the cause in the District Court.

Decree vacated.

A true copy.

Test:

Clerk, Supreme Court, U. S.